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Fast and Furious lawsuit could bite GOP

By: Rep. Brad Miller

The Operation Fast and Furious investigation may not work out the way House Republicans expect.

After an acrimonious partisan debate, House Republicans forced a vote last month on criminal contempt of Congress charges against Attorney General Eric Holder for refusing to produce some subpoenaed documents. President Barack Obama had asserted that these papers were privileged and told Holder to withhold them.

To no one's surprise, the Justice Department soon announced there would be no prosecution.

But House Republicans also authorized a lawsuit, asking the court to decide if they are entitled to the documents and if so, to issue an injunction requiring Holder to produce them. Speaker John Boehner (R-Ohio) said that House Republicans would file the lawsuit "within the next several weeks."

Yet a lawsuit offers relatively little opportunity for more partisan acrimony. Judges generally

discourage repetition of dishonest talking points and intemperate personal attacks — now staples of House debate and cable news.

House Republicans, however, probably expect that filing means one more round of media appearances to complain about obstruction and cover-up. Then the lawsuit will likely disappear for months — until long after the election. So Republicans probably think they have nothing to lose.

They may be wrong.

Five years ago, House Democrats investigated allegations that the Bush administration had fired nine U.S. attorneys for refusing to play politics with criminal investigations in order to help Republicans. Potential improper political influence in criminal prosecution is a familiar subject of congressional investigations. A Supreme Court decision had called similar evidence in the 1920s Teapot Dome scandal "grave and requiring legislative attention and action."

The Bush administration, however, refused to allow any testimony by the White House officials — including chief of staff Josh Bolton, White House counsel Harriet Miers and Karl Rove — who had apparently decided to fire the federal prosecutors. The administration argued that the president alone could decide what was privileged, and Congress could not challenge it.

House Democrats filed a lawsuit in response. The Bush administration argued that the court could not challenge the president's claim of privilege either. But the judge disagreed. He ruled that the White House officials were required to testify but could "invoke executive privilege where appropriate" during their testimony.

As to documents, the judge said the administration should produce a "detailed description of the documents withheld and privileges asserted" — so the court could decide the claim of privilege one document at a time.

Obama was elected president three months later. House Democrats and the new administration quietly settled.

House Republicans' lawsuit will now probably pick up where that suit left off. It may, however, be a far different experience from their investigation so far. The Fast and Furious investigation has been a one-sided fight, with House Republicans dishing it out and the DOJ taking it. A lawsuit may be a fair fight.

The courts recognize a privilege for some executive branch discussions to encourage uninhibited, candid advice, which can yield better decisions. The courts recognize a strong privilege for discussions between the president and his top advisers and a weaker privilege for other debates in the executive branch.

For example, a judge may require the DOJ to provide some privileged documents if House Republicans show they need the information for their investigation — especially if there is some plausible reason to view them as evidence of official misconduct.

Executive privilege remains ill-defined. But it may come down to whether the DOJ's interest in encouraging uninhibited internal discussions is outweighed by House Republicans' legitimate need for the information in their investigation.

In a lawsuit, both House Republicans and the DOJ can require the other to provide documents and answer questions under oath. The DOJ may require House Republicans to provide documents about the Fast and Furious investigation, including emails and memos. They may require House Republicans to attend depositions and answer relevant questions about the investigation.

Exactly what is the information Republicans insist would show Fast and Furious was devised to increase gun crimes and would build public support for gun control? What evidence do they have that senior DOJ officials were involved? What discussions did they have with the media about the investigation or with the related special-interest groups? Was partisan politics a consideration?

There is no obvious reason why the documents and the testimony would not be public.

House Republicans may regret picking this fight.

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